United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1092

ORIGINAL

United States Court of Appeals

For the Second Circuit

OVERSEAS AFRICAN CONSTRUCTION CORPORATION, Employer, and ST. PAUL MERCURY INSURANCE COMPANY, Carrier,

Plaintiffs-Appellants-Appellees,

against

EUGENE McMULLEN, Dec'd, by GEORGE McMULLEN, Executor, and JOHN D. McLELLAN, JR., Deputy Commissioner, United States Employees' Compensation Commission, Second Compensation District,

Defendants-Appellees-Appellants.

REPLY AND ANSWERING BRIEFS FOR PLAINTIFFS-APPELLANTS-APPELLEES OVERSEAS AFRICAN CONSTRUCTION CORP. AND ST. PAUL MERCURY INSURANCE COMPANY

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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS-APPELLEES OVERSEAS AFRICAN CONSTRUCTION CORP. AND ST. PAUL MERCURY INSURANCE COMPANY

The plaintiffs-appellants-appellees reply to the answer of the defendants-appellees-appellants, John D. McLellan, Jr., Deputy Commissioner, as to the jurisdiction of the Defense Base Act in this proceeding.

POINT I

The deputy commissioner's argument that the court below correctly determined there was substantial evidence in the record to support the deputy commissioner's conclusion that McMullen's employment was within the coverage of the Defense Base Act is totally erroneous as a matter of law.

The deputy commissioner argues that based on the following *facts* the decision of the deputy commissioner was made that McMullen's employment under the contract comes within the jurisdiction of the Defense Base Act • • • "that the project McMullen was employed involved "public work" within the meaning of the Defense Base Act (42 U.S.C. 1651); that a) the United States Army Corps of Engineers supervised the project and certified the completion of segments, b) payment was made by the Agency for International Development, c) that the Employer believed that its employees on the project were within the coverage of the Defense Base Act, d) and therefore insured its obligations under that Act.[1]

The deputy commissioner predicates jurisdiction on facts and not interpretation of the Defense Base Act.

The Employer and Carrier are arguing a *question of law* as to jurisdiction and the applicability of the Defense Base Act in this case.

There cannot be a statutory presumption as to jurisdiction as stated by the deputy commissioner and the court below.

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1. Brief for Appellees—page 6.

We will concede that statutory presumptions apply where there are questions of fact to be decided by the deputy commissioner or court.

As set forth in our principal brief, both the deputy commissioner and the court below erroneously assumed that the question of jurisdiction is an issue of fact rather than an issue of law.

A full and complete reading of the Defense Base Act will show that the appellee's arguments are without merit or substance and that McMullen does not come within its provisions.

Under section 1(a) subdivision (4) of the Defense Base Act—in order for jurisdiction to apply, • • • McMullen must be engaged in employment • • • "under a contract entered into with the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract, or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1)-(3) of this subsection, for the purpose of engaging in public work • • •"

The appellees argue that section 1(a)(4) of the Defense Base Act applies and jurisdiction is present but they have not shown the very essence of jurisdiction—*an employment under a contract entered into by the United States or any of its instrumentalities* • • • that is required under the section.

The construction contract under which McMullen's employment commenced was entered between his employer and the Republic of Somalia (appendix 49a)—and not with the United States or any corporate instrumentality of the United States.

Therefore, section 1(a)(4) of the Defense Base Act excludes jurisdiction and McMullen from its provisions.

Now turning to section 1(a)(5) of the Defense Base Act.

The deputy commissioner's brief states that the Mutual Security Act of 1954, as amended was repealed by the Foreign Assistance Act of 1961, P.L. 87-195, 75 Stat., 424, 460. However, the deputy commissioner goes on to state that the development loan provisions of the Mutual Security Act were replaced by *similar provisions* in the Foreign Assistance Act of 1961.

Although the Mutual Security Act of 1954, as amended was repealed by the Foreign Assistance Act of 1961, the statute enacted was changed in form but not in substance.

A study of the legislative history with respect to the effect of the Foreign Assistance Act of 1961, will indicate, that on the Development Loan Fund contracts it leaves unaffected existing Development Loan Fund contracts which were absolutely excluded from coverage by the Mutual Security Acts of 1954 and 1958 (United States Code Congressional and Administrative News—87th Congress—First Session—page 2555).

Under Section 1(a)(5) of the Defense Base Act, in order for jurisdiction to apply, * * * McMullen must be

engaged in employment • • • under a contract approved and financed by the United States or any executive departments, or agency thereof • • • under the Mutual Security Act of 1954, as amended (other than title II of chapter II • • •).

The construction contract herein was approved by the Republic of Somalia—not by the United States—although financed by the Agency for International Development. Besides, since the project was under a Development Loan, it was excluded from the provisions of the Defense Base Act.

The deputy commissioner states that the letter from A.I.D. does not indicate the relationship between the parenthetical exclusion of the Defense Base Act, section 1(a)(5) and the fact that the construction contract was totally financed on a development loan basis (Appendix 8a). The record will indicate that the deputy commissioner was aware of the contentions made by the carrier that the Defense Base Act did not apply and the contract was financed as a development loan. At the formal hearing, the deputy commissioner acknowledged having read a letter from the carrier with respect to its contentions and stated, "But there is no firsthand information in showing what these contracts were, as the insurance company alleges, having to do solely with development loan fund contract" (p. 98—Transcript). Thereupon the deputy commissioner gave the carrier 30 days to submit something to throw some light on the specific question of whether this was solely a development loan fund project (pp. 99 & 100—Transcript).

Thereafter, the carrier produced the letter from the Department of State—Agency For International Develop-

ment (Appendix—8a), confirming that the work performed by the employer herein, was totally financed on a development loan basis.

From the above, it can be seen that the deputy commissioner was aware of all aspects of the carrier's contentions prior to his decision.

Conclusion

For the foregoing reasons, the District Court's judgment should be reversed on the ground that McMullen does not come within the provisions of the Defense Base Act.

Respectfully submitted,

JACOWITZ & SILVERMAN, P.C.
Attorneys for
Plaintiffs-Appellants-Appellees

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Defendants-Appellees-Appellants.

ANSWERING BRIEF FOR PLAINTIFFS-APPELLANTS-APPELLEES OVERSEAS AFRICAN CONSTRUCTION CORP. AND ST. PAUL MERCURY INSURANCE COMPANY

The plaintiffs-appellants-appellees answer the cross-appeal of the defendant McLellan as to whether the court below properly assessed legal fees incurred by McMullen against the award of compensation.

POINT II

The court below properly assessed legal fees incurred by McMullen and the court below should be affirmed in so far as the assessment of additional attorney's fees is concerned.

There is no question but that the court below properly assessed the request for additional attorney's fees against the award payable to the Estate of McMullen. Nothing cited in the brief for the deputy commissioner stands to the contrary. All the cases cited therein can be clearly distinguished from the present matter, and cannot support the contention of the deputy commissioner.

The case of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) involves a question of interpretation of a New Jersey statute, which on its face makes itself applicable to any pending matter. The Supreme Court found that in a diversity case, the court below was obliged to enforce the substantive law of the State wherein the parties sought the remedy.

The deputy commissioner advocates that the amendment to the *Longshoremen's and Harbor Workers' Compensation Act*, P.L. 92-576, 86 Stat. 1251 should be interpreted for the purposes of imposing prospective attorney's fees, on the same ground as applied to the *Emergency School Aid Act of 1972*, P.L. 92-318, 86 Stat. 235, 20 U.S.C. 1617. However, the two cases cited by the deputy commissioner do not support his position. In the case of *Northcross* v. *Board of Education*, 412 U.S. 427 (1973) the Court remanded the

matter to the 6th Circuit Court of Appeals for further development. In the case of *Bradley* v. *School Board of Richmond,* 472 F.2d 318 (4th Cir. 1972) cert. granted, 412 U.S. 937 (1973) the Court, sitting *en banc,* refused to assess any attorney's fees against the defendant School Board. As noted, certiorari was granted by the Supreme Court, and that matter has not been reported.

The Supreme Court in its decision in the case of *Northcross* v. *Board of Education* (*supra*) set forth the rationale for the imposition of attorney fees in matters arising out of the *Emergency School Aid Act of 1972* (*supra*). The Court stated that the underlying principle is that in the school desegregation cases, the plaintiff's attorneys were acting as "private attorney generals" vindicating matters of national policy. The Court cited therein the case of *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968) wherein the Court set forth the same criteria in matters arising out of the cases stemming from the Civil Rights Act of 1964—P.L. 88-352, 78 Stat. 241, Title 2, sec. 204.

There can be no question but that had the present action commenced after the effective date of the amendment to the *Longshoremen's and Harbor Workers' Act,* 33 U.S.C. 901 *et seq.* that attorney's fees would be chargeable against the carrier. However, the deputy commissioner would have the Court apply the 1972 amendment to a pending matter, without citing any authority to support his position. Surely, it cannot be said that litigation before a deputy commissioner for the vindication of a private right can be equated with the vindication of "national policy," as set forth in the case of *Newman* v. *Piggie Park Enterprises* (*supra*) and

Northcross v. *Board of Education* (*supra*). The court below correctly applied the law in so far as fees are concerned, and the decision below should not be disturbed.

Conclusion

The court below properly assessed legal fees incurred by McMullen against the award of compensation and the court should be affirmed and the cross-appeal denied.

Respectfully submitted,

JACOWITZ & SILVERMAN, P.C.
Attorneys for
Plaintiffs-Appellants-Appellees

Affidavit of Service by Mail

In re:

Overseas African Construction Corp. v. McMullen

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on APR 15 1974, 197..., he served 3 copies of the within Brief in the above named matter on the following counsel by enclosing said three copies in a securely sealed postpaid wrapper addressed as follows:

Joshua T. Gillelan, II, Esq.
U.S. Department of Labor
14th & Constitution Avenue, N. W.
Washington, D.C. 20210

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 15th day of April 1974

Jack A Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1975

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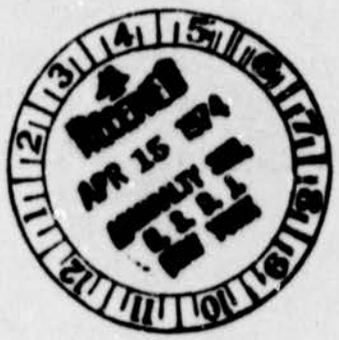

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